this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act We will not discriminate in regard to the hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization

BAUSCH & LOMB OPTICAL COMPANY,
Employer

Dated ... . . By . . . . . (Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material

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PACIFIC INTERMOUNTAIN EXPRESS COMPANY *and* CARLOS BEALL

PACIFIC INTERMOUNTAIN EXPRESS COMPANY *and* PAUL DUNBAR

PACIFIC INTERMOUNTAIN EXPRESS COMPANY *and* ALVIN CHATBURN

PACIFIC INTERMOUNTAIN EXPRESS COMPANY *and* J. M. NIEHAUS

PACIFIC INTERMOUNTAIN EXPRESS COMPANY *and* WILLIS BRADSHAW

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL *and* CARLOS BEALL

INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL *and* PAUL DUNBAR

INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL *and* ALVIN CHATBURN

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL *and* J. M. NIEHAUS

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL *and* WILLIS BRADSHAW. Cases Nos. 17-CA-535, 17-CA-536, 17-CA-537, 17-CA-541, 17-CA-583, 17-CB-64, 17-CB-65, 17-CB-66, 17-CB-68, and 17-CB-79. January 14, 1954.

DECISION AND ORDER

On April 29, 1953, Trial Examiner John H. Eadie issued his Intermediate Report in the above-entitled consolidated proceedings, finding that the Respondents, Pacific Intermountain Express Company, herein called the Respondent Company or the Company, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, herein called the Respondent Union or the Union, had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent Company had not engaged in certain other alleged unfair labor practices, and recommended dismissal of those allegations of the complaint. Thereafter, the Respondent Company, the Respondent Union, and the General Counsel filed exceptions to the Intermediate Report and supporting briefs. The Respondent Company and the Respondent Union also requested oral argument. This request is hereby denied because, in our opinion, the record,[1] the exceptions, and the briefs adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent indicated below and with the following additions and modifications:

1. We find, in agreement with the Trial Examiner, that the Respondent Company discriminated against Carlos Beall, Paul Dunbar, Alvin Chatburn, J. M. Niehaus, and Willis Bradshaw in violation of Section 8 (a) (3) and 8 (a) (1) of the Act.

For the past 9 years, the Company, which is engaged in the transportation of commodities by motor carrier, has recognized the Union and the Central States Drivers Council as the exclusive representative of the over-the-road drivers em-

[1] The Board has corrected the record in accordance with the "Stipulation to correct Transcript" filed by the parties.

ployed at its Kansas City, Missouri, terminal, pursuant to the "Central States Area Over-the-Road Motor Freight Agreements," which cover several thousand employers and various Teamsters locals in a 12 State area.[2] The contract executed by the Respondents on November 12, 1949, to be effective from November 16, 1949, until January 31, 1952, contained, in addition to a deferred union-security provision, the following provisions:

> Article V. Seniority. Section 1. Seniority rights for employees shall prevail . . . . A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement.
>
> Section 3.(a) All runs and new positions are subject to seniority and shall be posted for bids . . . When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in the reverse order in which they are laid off. (Emphasis supplied.)

On January 31, 1952, the Respondents executed another contract, effective from February 1, 1952, until January 31, 1955. This contract contains seniority provisions similar to those in the preceding contract. Article V, however, was amended in the respect underscored below:

> Article V. Seniority. Section 1. . . . . Any controversy over the seniority standing of any employees on this list shall be referred to the Union for settlement. Such determination shall be made without regard to whether the employees involved are members or not members of a Union.

The Company operates a set number of regularly scheduled runs on four main routes from its Kansas City terminal. Pursuant to the contracts set forth above, these runs, commonly referred to as "bid runs," are posted for bidding at least once a year and are awarded solely on the basis of the seniority of the employees bidding. In addition to these regularly scheduled runs, the Company also operates runs to take care of any overflow business, and maintains an "extra board"

[2] The Respondent Company has been represented in the negotiations and execution of these contracts by the Central States Area Employers Association, of which it is a member.

listing the names of the drivers operating these extra runs. Unlike the regular runs, extra runs are not subject to bidding. Employees who do not obtain regular runs, either because they do not possess enough seniority or, for some reason, fail to submit bids, are automatically placed on the extra board. From 1946 until November 1951, extra runs were assigned among the employees on the extra board on a rotation basis. In November 1951, however, pursuant to an agreement between the Respondents, the Company began to operate the extra board on a seniority basis. In April or May 1952, at the request of the Respondent Union, the Company reverted to a rotation system in the assignment of extra runs and, in July 1952, also upon the request of the Union, changed back to a seniority system. At the time of the hearing, extra runs were being assigned by the Respondent Company on the basis of seniority.

Although both the 1949 and 1952 contracts between the Respondents provide merely that "controversies" with respect to seniority shall be referred to the Union for settlement, it is clear, as the Trial Examiner found, that the Respondent Union actually determined the seniority standing of all employees covered by these agreements. Thus, the seniority lists which were posted by the Company at its terminal and which, pursuant to the Respondents' contracts, were utilized by the Company in effecting reductions in force and in the assignment of regular runs and of extra runs during the periods when the extra board was operated on a seniority basis, were those prepared by the Union and not those originally prepared by the Company on the basis of the dates of employment of the employees listed. Further, the record reveals, as the Trial Examiner found, that the Respondent Union, in preparing its seniority lists, established the seniority dates of employees who were not members of the Union when hired as of the date upon which they became members of the Union rather than as of the date of their employment;[3] with respect to those employees who were members of the Union when hired, however, their seniority was established as of the date of their employment by the Company.

[3] The Union admits that, pursuant to a rule of 15 years' standing, it had, until April 21, 1952, fixed the seniority of employees transferring from another Teamsters local as of the date they effected their transfer to the Respondent Union, rather than as of the date of their employment This policy was changed by the Union on April 21, 1952, and, since that date, the Union has established the seniority of employees transferring from another Teamsters local as of the date of their employment by the Company. The Union also admits that, pursuant to the international constitution, the seniority of employees on withdrawal cards from the Respondent Union dated--and still dates--from the time that they deposited their withdrawal cards with the Union and not from the date of their employment. The seniority lists in evidence further reveal, as the Trial Examiner found in discrediting the contrary testimony of the president of the Respondent Union, that the Union fixed the seniority of those employees who were not members of the Union when hired and who were not on transfer or withdrawal cards, as of the date of their initiation into membership rather than as of the date of their employment by the Company.

As a result of the Union's methods of determining seniority and the Company's utilization of the Union's seniority lists in assigning runs and in making layoffs, each of the charging parties herein was adversely affected in his employment. Chatburn, Dunbar,[4] Niehaus, and Beall, all members of other Teamsters locals, transferred to the Respondent Union after being employed by the Respondent Company, and each was assigned a seniority date later than the date of his employment. Bradshaw was on a withdrawal card from the Respondent Union and was assigned a seniority date as of the date he deposited his withdrawal card, 3 days after he was hired. Thus, employees who were hired after the charging parties were employed by the Company, but who became members of the Respondent Union earlier, were accorded a higher rank on the seniority lists posted at the Company's terminal and, pursuant to the Respondents' contracts, were given preference in reductions in force, in the assignment of regular runs, and in the assignment of extra runs during the periods when the extra board was operated on a seniority basis.

On the basis of these facts, we conclude, in accord with the conclusion of the Trial Examiner, that the Respondent Company discriminatorily enforced the seniority provisions of its 1949 and 1952 contracts with the Respondent Union and thereby discriminated against each of the charging parties in violation of Section 8 (a) (3) and 8 (a) (1) of the Act. As set forth above, these contracts provided that "all runs and new positions" would be subject to seniority and that reductions in the work force would be made according to seniority.[5] In addition, beginning in mid-November 1951, the assignment of extra runs was also made subject to seniority, pursuant to an agreement between the Respondents, and these runs continued to be assigned on the basis of seniority until April or May 1952. In determining seniority, however, the Company gave effect to the Union's decisions, which were, in turn, based, not on the dates of employment of the employees involved, but on the dates upon which they became members of, or renewed their membership in, the Respondent Union. Thus, the assignment of runs and the determination as to which employees would be laid off were, in effect, made on the basis of membership in the Union. The effect of the Respondent Company's conduct, in making seniority the determinative factor in the assignment of jobs and, in making seniority dependent upon union membership, was to

[4] Although Dunbar had been a member of another Teamsters local in Des Moines, Iowa, he was delinquent in his dues at the time of his employment by the Company. In order to become a member of the Respondent Union sooner, he paid a reinstatement fee to the Respondent Union instead of paying up his back dues in the Des Moines local and then transferring to te Respondent Union.

[5] Although article V, section 3 (a), of both contracts provides that the last man hired shall be the first to be laid off, the evidence clearly shows that the determination as to which employees were hired last was based upon the seniority lists posted at the Company's terminal.

encourage and actually require employees to become members of the Respondent Union as soon as they were hired.[6] Therefore, even during the period when there were valid union-security provisions in effect,[7] these provisions did not protect the Company's conduct, which required employees to become members of the Union immediately after they were hired, rather than according them the 30-day grace period provided for in the proviso to Section 8 (a) (3) of the Act.

Although we agree with the Trial Examiner's conclusion that the Respondent Company unlawfully discriminated against all the charging parties with respect to work assignments, we cannot adopt his conclusion that the Company further discriminated against Carlos Beall and Willis Bradshaw by constructively discharging them on August 1, 1952, and August 21, 1952, respectively. The complaint herein does not allege any constructive discharge and this issue was not litigated at the hearing. Indeed, the General Counsel made no contention that the Company had constructively discharged Beall and Bradshaw until he submitted his brief to the Trial Examiner.[8] In view of these facts, we deem it unnecessary to determine whether, if

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[6] The record reveals that unless an employee became a member of the Union, his name did not appear on the seniority list posted at the terminal. Therefore, he could not be eligible for a scheduled run or, during the periods when the extra board was operated on a seniority basis, for any job at all. The record also reveals that the Company informed employees when they were hired, or shortly thereafter, that their seniority would be determined by the Union and would date from the time that they became members in good standing of the Union.

The decision of the court of appeals in N. L. R. B. v. Teamsters, 196 F. 2d 1 (C. A. 8), cert. granted 344 U. S. 853, relied upon by the Respondent Company in support of its contention that the Respondents' conduct could not have encouraged or discouraged membership in any labor organization, is clearly inapposite. There, the court, in denying enforcement of the Board's order in International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L. (Byers Transportation Company, Inc.), 94 NLRB 1494, held that the reduction in seniority of an employee resulting from the application of a seniority clause in a contract and his consequent loss of work assignments did not encourage or discourage membership in the union where the employee involved was already a member of the union and, in the absence of a valid union-security agreement, was not required to become or remain a member of the union. The instant cases, however, unlike the Byers case, do not involve a union's application of a seniority clause solely to its own members. As the Respondent Union was applying the seniority provisions of the contracts involved herein to both members and nonmembers and was, indeed, granting preference in seniority determinations to employees who were already members in good standing of the Union, it is clear that the Company's action, in assigning jobs on the basis of such seniority determinations, did encourage membership in the Respondent Union.

[7] The Respondents' current contract effective February 1, 1952, contains valid union-security provisions, while the 1949 contract had a deferred union-security clause, which was to become effective only after an election and certification pursuant to former Section 9 (e) (1) of the Act.

However, in view of our finding above, it is unnecessary to pass upon the Trial Examiner's finding that the union-security clause in the 1949 contract "became lawful when the Act was amended on October 22, 1951."

[8] The Trial Examiner stated that the General Counsel had contended that Beall and Bradshaw were constructively discharged on August 1 and August 21, 1952, respectively. Although the General Counsel did make such a contention in his brief to the Trial Examiner, no such allegation was made in the complaint nor was this contention made at the hearing.

this issue had been alleged and litigated, the facts would support the Trial Examiner's conclusion that Beall and Bradshaw were constructively discharged.[9] Under the circumstances, we conclude that, although they were discriminated against with respect to work assignments, Beall and Bradshaw voluntarily quit work on August 1, 1952, and August 21, 1952, respectively.

2. We also find, in accord with the conclusion of the Trial Examiner, that the Respondent Union caused the Respondent Company to discriminate against Beall, Dunbar, Chatburn, Niehaus, and Bradshaw, and that the Union thereby violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

As set forth above, the Company and the Union were parties to contracts which provided that controversies with respect to the seniority standings of employees would be referred to the Union for settlement and that jobs would be awarded on the basis of seniority. Furthermore, these contracts were enforced by the Respondents in such a manner that the Union actually determined the seniority standings of the Company's employees and made such determinations on the basis of the employees' membership in the Respondent Union. Indeed, in discriminating against the charging parties with respect to work assignments, the Company was giving effect to these contracts and to the seniority determinations of the Respondent Union. Accordingly, we conclude that the Respondent Union, by being a party to the 1949 and 1952 contracts and to the discriminatory enforcement of the seniority provisions thereof, became jointly responsible with the Respondent Company for the acts of discrimination resulting from the enforcement of these provisions.[10]

We find no merit in the Respondent Union's contention that, even though, pursuant to the contracts set forth above, seniority was the basis for the assignment of jobs, the Union's determinations with respect to the seniority of employees on transfer or withdrawal cards were protected by the proviso to Section 8 (b) (1) (A) of the Act because the contracts were made pursuant to the rules and bylaws of the International and the Union. The Board has consistently held that this proviso does not protect conduct which would otherwise be violative of the Act merely because such conduct was taken pursuant to union regulations.[11] Moreover, the record reveals, and we have found, that the Union also discriminatorily determined the seniority of employees who were not members of the Union and were not on transfer or withdrawal cards and who were therefore not subject to the Union's or the International's rules and bylaws. Accordingly, we reject the Union's contention that its seniority determinations were protected by the proviso to Section 8 (b) (1) (A) of the Act.

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[9] Hunter Engineering Company, 104 NLRB 1016.

[10] Utah Construction Co., et al , 95 NLRB 196.

[11] Utah Construction Co., et al., footnote 10, supra; Sub Grade Engineering Company, 93 NLRB 406; Byers Transportation Company, Inc., footnote 6, supra.

3. The Trial Examiner failed to find, as alleged in the complaint, that the Respondent Company violated Section 8 (a) (2) of the Act by discriminatorily enforcing the seniority provisions described above of the 1949 and 1952 contracts with the Respondent Union. The General Counsel has excepted to the Trial Examiner's failure to make such a finding.

As set forth above, in discussing the Company's discrimination against the charging parties, the Company enforced the seniority provisions of the 1949 and 1952 contracts in such a manner as to require employees to become members of the Union as soon as they were hired. We have found that the Company, in so doing, violated Section 8 (a) (3) and 8 (a)(1) of the Act. As the Respondent Company thereby lent its support to the Respondent Union in recruiting the latter's membership at a time when, under the Act, the employees were free to refrain from joining the Union, we conclude that the Company also violated Section 8 (a) (2) by its discriminatory enforcement of these seniority provisions.[12]

4. We also find, unlike the Trial Examiner, that the Respondent Company further violated Section 8 (a) (1), 8 (a) (2), and 8 (a) (3) of the Act and that the Respondent Union further violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by maintaining and enforcing their 1949 contract and by entering into, maintaining, and enforcing their 1952 contract.

As mentioned above, both the 1949 contract and the current contract between the Respondents contain almost identical seniority provisions, delegating to the Union the authority to settle controversies relating to seniority, except that the 1952 contract provides that, in determining such controversies, the Union shall do so "without regard to whether the employees involved are members or not members of the Union." By both contracts, therefore, the Respondent Company delegated to the Respondent Union complete control over the determination of seniority; and seniority, in turn, was made the determinative factor in the assignment of jobs and making layoffs. Thus the Company in effect delegated to the Union complete authority in both instances to determine work assignments and reductions in force.

In Firestone Tire and Rubber Company,[13] which also involved the Respondent Union, the Board was called upon to determine the legality of a seniority provision identical to that in the Respondents' 1949 contract. The Board there held that such a provision did not violate the Act because "the seniority provision, although permitting the Union to control seniority to some extent, [did] not on its face provide that the Union should do so because of union affiliation." Seemingly because of the Board's decision in the Firestone case, the General Counsel has not alleged in the instant proceedings that the seniority

[12] Mundet Cork Corporation, et al, 96 NLRB 1142; Sterling Furniture Company, 94 NLRB 32

[13] 93 NLRB 981 (Member Reynolds concurring).

provisions of the Respondents' contracts are violative of the Act. The complaint does allege, however, that the Respondents discriminatorily enforced these provisions in violation of Section 8 (a) (1), 8 (a) (2), 8 (a) (3), 8 (b) (2), and 8 (b) (1) (A) of the Act. Moreover, the Respondents have relied upon these seniority provisions and upon the Board's decision thereon in the Firestone case as a defense to the discriminations alleged herein. Accordingly, we find that the legality of the seniority provisions of both the 1949 and 1952 contracts has been put in issue.[14]

Upon consideration of the legal effect of the seniority provision in the Firestone case, and upon analysis of the Respondents' 1949 contract which includes an identical seniority provision, we believe that such a provision is itself violative of the Act, even though it does not on its face provide that the union shall make its seniority determination on the basis of union affiliation. Accordingly, insofar as the Firestone case holds to the contrary, it is hereby overruled. We also find that the seniority provision of the Respondents' 1952 contract is similarly violative of the Act, even though it specifically provides that the Union shall make its seniority determinations "without regard to whether the employees involved are members or not members of a Union."

The objective standards relevant to a determination of seniority generally derive from the employment history of the employees involved, and that information is, as a rule, peculiarly within the knowledge of the employer. Indeed, the area in which the union is likely to be more informed than the employer with respect to the employer's employees is that pertaining to employees' union membership or to the employees' compliance with the union's constitution, bylaws, or other regulations--subjects, however, which obviously are not relevant considerations in the implementation of a seniority provision. We can therefore see no basis for presuming that when an employer delegates to a union the authority to determine the seniority of its employees, or even to settle controversies with respect to seniority, such control will be exercised by the union in a nondiscriminatory manner. Rather, it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union. Accordingly, the inclusion of a bare provision, like that in the 1949 contract, that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the union. And because we believe that it will similarly tend to encourage membership in the union, we also conclude that, the inclusion of a statement, like that in the 1952 contract, that seniority will be determined without regard to union membership is not by itself enough to cure the vice of giving to the union complete

[14] Cf Green Bay Drop Forge Co., 95 NLRB 399 at 400.

control over the settlement of a "controversy" with respect to seniority.

5. The General Counsel has excepted to the Trial Examiner's failure to find, as alleged in the complaint, that since April 15, 1952, both the Company and the Union have denied the charging parties their seniority rights because they filed charges or gave testimony to the Board, and that the Respondent Company has thereby violated Section 8 (a) (4) of the Act. Although we agree with the Trial Examiner's conclusion that the Company has not violated Section 8 (a) (4), we cannot adopt his reasons for this conclusion.

The record reveals, and the Trial Examiner found, that one of the charging parties, Chatburn, was informed by a union steward that the Union would not process his grievance with respect to his rank on the seniority list because Chatburn had filed a charge with the Board. The record further reveals that, after the filing of charges herein,[15] the Respondent Union, on April 21, 1952, changed its policy with respect to determining the seniority of employees transferring to the Union and, since that time, has established the seniority of newly hired employees as of the date of their employment rather than as of the date of their transfer, as it had previously done. At the time of the hearing, however, the seniority dates of the charging parties who had previously transferred to the Union had not yet been corrected.

The Board has often held that when an employer delegates to a union the authority to control conditions of employment, it becomes responsible for the discriminatory manner in which the union exercises such authority.[16] However, the Union's statement to Chatburn with respect to processing his grievance clearly did not fall within the scope of its authority to settle controversies over, or to determine initially, the seniority standings of the Company's employees. Accordingly, we can perceive no basis for holding that the Company was responsible for the Union's statement to Chatburn and that it thereby violated Section 8 (a) (4) of the Act.

The General Counsel asserts that its statement to Chatburn is evidence of the fact that the Union's failure to change the seniority dates of the charging parties in conformity with the Union's new seniority policy applicable to transferees, was a retaliation for their having filed charges with the Board, and that the Company is responsible for the Union's failure to correct the seniority dates of these employees. It appears that the Union was acting within the scope of its authority under the contracts, as interpreted by the Respondents, when it failed to change the seniority dates of the charging parties, and it would appear further that were the Union to be found to have

[15] The first charge herein was filed on April 14, 1952.

[16] Sub Grade Engineering Company, footnote 11, supra; Air Products, Incorporated, 91 NLRB 1381

acted discriminatorily in failing to change these dates, the Company would be responsible therefor. However, except for the Union's statement to Chatburn, there is no evidence to show that the Union, in failing or refusing to correct these seniority dates, was motivated, as the General Counsel asserts, by the fact that the employees involved herein had filed charges. On the contrary, the evidence shows that, although the Union did adopt a new method of determining the seniority of transferees on April 21, 1952, it did not revise any of the seniority determinations it had previously made on the basis of its old policy,[17] but continued in effect the discriminatorily established seniority dates of all employees who had transferred to the Respondent Union before April 21, 1952. As the Union did not limit its conduct in this respect to the charging parties, we find, despite the Union's statement to Chatburn, that the Union's failure to correct the seniority dates of the charging parties was not caused by the fact that they had filed charges under the Act.[18] Accordingly, we conclude that, by continuing to give effect to these seniority dates, the Company did not violate Section 8 (a) (4) of the Act.

6. We also conclude, in accord with the Trial Examiner, that the Respondent Company did not violate Section 8 (a) (2) of the Act by deducting from the wages of its employees, at the request of the Union, a $2 "over-the-road assessment" in February 1952.[19]

The record reveals that in February 1952, the Company deducted from the wages of those employees who had signed written authorizations for dues deductions, $2 in addition to the regular dues deducted. Apparently, this $2 is levied annually by the Central States Drivers Council as an "over-the-road assessment," in return for which each employee paying this "assessment" receives a road driver's card entitling him to benefits in the Central States Drivers Council. The Trial Examiner found that the Company viewed the amount levied by the Council, which the Company deducted from the wages of its employees and remitted to the Respondent Union, not as an assessment, but as annual dues to the Council. He therefore concluded that, as the Company merely deducted "uniform dues" from the wages of its employees, it had not thereby violated Section 8 (a) (2) of the Act.

[17] The only changes reflected in the seniority lists issued after April 21, 1952, relate to the seniority of two employees, Alan Babb and Daniel Oldfield. The change in Babb's seniority, from July 7, 1950, to July 18, 1950, could not have been based on the Union's revised policy as his seniority was lessened by the Union's change. Oldfield's seniority date was changed from February 10, 1947, to February 20, 1946, on both the list prepared by the Company and that prepared by the Union in November 1952, apparently as a result of a hearing held by the Union in October 1952.

[18] See Dolores, Inc., 98 NLRB 550.

[19] Board Member Rodgers would find that the Respondent violated the Act by deducting the "over-the-road assessment." In his opinion, the deduction constituted "dues" within the meaning of Section 302 and, as no authorizations had been made therefor, the employees were necessarily coerced thereby and the Union unlawfully supported.

Unlike the Trial Examiner, we deem it unnecessary to determine whether the amount deducted by the Company represented dues or assessments. The Board has previously held that in determining whether checkoff violates Section 8 of the Act, the limitations on checkoff imposed by Section 302 of the Act should not be considered.[20] Therefore, unless the Company coerced its employees into paying the "over-the-road assessments," there is no basis for holding that the Company violated Section 8 (a) (2) by making these deductions, whether the deductions represented dues or assessments.[21] The General Counsel has not alleged that the employees were coerced into making these payments, and the only evidence of coercion is the fact that the employees had not signed any written authorizations for this extra $2 deduction.[22] However, as the employees apparently voiced no objection to the Company's deducting the $2 "over-the-road assessment" from their wages, we believe that the mere fact that they had not signed any written authorizations therefor is insufficient to show that they were coerced into agreeing to such deductions. Accordingly, we conclude that the Company did not violate Section 8 (a) (2) by making these deductions from the wages of its employees.

THE REMEDY

Having found that the Respondent Company and the Respondent Union have engaged in certain unfair labor practices, we shall order them to cease and desist therefrom and to take affirmative action necessary to effectuate the policies of the Act.

We have found, in agreement with the Trial Examiner, that the Respondent Company discriminated against Carlos Beall, Paul Dunbar, Alvin Chatburn, J. M. Niehaus, and Willis Bradshaw in violation of Section 8 (a) (3) and 8 (a) (1) of the Act, and that the Respondent Union caused the Company to do so in violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act. The Trial Examiner, however, did not recommend that the Respondents make whole all the charging parties for the loss of pay suffered by them as a result of such discrimination. With respect to Beall and Bradshaw, who had left their work on August 1, 1952, and August 21, 1952, respectively, the Trial Examiner found that the Company had "constructively discharged" them and recommended their reinstatement and back pay from the dates of their discharges. The Trial Examiner also found that the Company's utilization of the Union's seniority determinations in assigning runs had adversely affected the work assignments of the other charging parties, but con-

[20] Salant & Salant, Inc., 88 NLRB 816 at 817.

[21] Salant & Salant, Inc., footnote 20, supra.

[22] As the employees had specifically authorized the Company to deduct $4 a month for dues to the Union, the Company's deduction of the additional $2 exceeded the amount specified in the employees' written authorizations.

cluded that "the evidence in this connection [was] speculative, and...not sufficiently definite" to afford a basis for a recommendation that they be made whole. The General Counsel has excepted to his failure to recommend that the Respondents make whole Chatburn, Dunbar, and Niehaus, and to his failure to include in his recommendation that Beall and Bradshaw be made whole, the period from November 21, 1951, until the dates of their "constructive" discharges.

As set forth above, we do not agree with the Trial Examiner's conclusion that the Company constructively discharged Beall and Bradshaw. Indeed, we have found, on the record before us, that Beall and Bradshaw voluntarily quit work on August 1, 1952, and August 21, 1952, respectively. Accordingly, we shall not order their reinstatement and shall order that the Respondents' liability for back pay due Beall and Bradshaw be terminated as of the dates upon which they voluntarily left the Company's employ.

We also find merit in the General Counsel's exception to the failure of the Trial Examiner to recommend that the Respondents make whole Chatburn, Dunbar, and Niehaus from mid-November 1951 until compliance with the Board's order, and to his failure to recommend that Beall and Bradshaw be made whole from mid-November 1951 until August 1, 1952, and August 21, 1952, respectively. As stated above, all the charging parties were similarly discriminated against in the assignment of runs. Contrary to the Trial Examiner's finding, the evidence in this regard is far from speculative. Moreover, the mere fact that it may be difficult to determine, on the record herein, the precise amounts of back pay due is no basis for a denial of our usual remedy.[23] Accordingly, we shall exercise our full remedial powers, but shall leave to the compliance stages of these proceedings the determination of the precise amounts of back pay due under our Order.

We shall therefore order the Respondent Company and the Respondent Union, jointly and severally, to make whole all the charging parties for any loss of pay suffered as a result of the discrimination against them. The Regional Director is hereby directed, however, to make every reasonable effort to assure that the back-pay liability is borne equally by the Respondents.

In accordance with the formula promulgated in F. W. Woolworth Company,[24] and for the reasons stated therein, we shall order that the loss of pay suffered by Chatburn, Dunbar, and Niehaus be computed on the basis of each separate calendar quarter or portion thereof during the period from the date of

[23] Austin Company, 101 NLRB 1257; Stanislaus Implement and Hardware Company, Ltd., 101 NLRB 394; New York Herald Tribune, Inc., 93 NLRB 419; The Hearst Consolidated Publications, Inc., 93 NLRB 237.

[24] 90 NLRB 289.

the discrimination against each, in mid-November 1951,[25] until the date of compliance with the Board's Order. As the Trial Examiner did not recommend that the Respondents make whole Chatburn, Dunbar, and Niehaus, the period from the date of the Intermediate Report to the date of the Order herein shall, in accordance with our usual practice, be excluded in computing the amount of back pay awarded to them.[26] We shall also order that the loss of pay suffered by Beall and Bradshaw be computed in the manner set forth in the Woolworth case during the period from the date of the discrimination against each, in mid-November 1951,[27] until the date on which each of them voluntarily quit work, in August 1952.

We have found that the Respondents' 1949 and 1952 contracts contained seniority provisions violative of Section 8 (a) (1), 8 (a) (2), 8 (a) (3), 8 (b) (1) (A), and 8 (b) (2) of the Act and that the Respondents discriminatorily enforced these provisions. Accordingly, we shall order the Respondents to cease giving effect to the unlawful seniority provisions of their collective-bargaining agreements and to refrain from executing agreements in the future containing such unlawful seniority provisions. In view of all the circumstances, including the fact that the unlawful seniority provisions of the contracts herein are not inseparable from or basic to the remaining provisions of the contracts and the further fact that the contracts involved herein apply not only to the Respondents, but to several thousand employers and various Teamsters locals in a 12-State area,[28] we shall not order the Respondents to cease giving effect to their entire contracts, nor shall we order the Company to withdraw or withhold recognition from the Union.[29]

ORDER

Upon the basis of the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as

[25] None of the charging parties suffered any discrimination in work assignments until mid-November 1951, when the extra board was put on a seniority basis, as, until that time, none had been employed long enough to be eligible for a regular scheduled run. At least one of the charging parties, Chatburn, was deprived of a regular run in the November 1951 and February 1952 biddings because of the Union's method of determining seniority Bradshaw was temporarily laid off in mid-November 1951 as a result of the Union's establishing his seniority as of October 11, 1951, instead of as of the date of his employment, on October 8, 1951, and he worked only sporadically after his layoff until his resignation on August 21, 1952. In addition, all the charging parties were adversely affected by the change from a rotating extra board to a seniority extra board in mid-November 1951.

[26] See Utah Construction Co., et al , footnote 10, supra.

[27] See footnote 25, supra

[28] Cf. Sterling Furniture Company, 105 NLRB 653. As in the Sterling case, the Respondent Company is a member of an employers' association, which represented the Company in the negotiation and execution of the contracts involved herein.

[29] The adoption of the usual order requiring the Company to cease giving effect to its agreement with the Respondent Union and to withhold recognition from the Union as the representative of its employees, unless and until that organization shall have been certified by the Board (see Julius Resnick Inc., 86 NLRB 38), is discretionary with the Board. Such remedy need not be applied where it would not effectuate the policies of the Act Construction Specialities Company, 102 NLRB 1542.

amended, the National Labor Relations Board hereby orders that:

1. The Respondent, Pacific Intermountain Express Company, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing or giving effect to the clauses in the contracts of November 12, 1949, and of January 31, 1952, known as the "Central States Area Over-the-Road Motor Freight Agreements" to which the Respondents are parties and which cover the employees at the Company's Kansas City, Missouri, terminal, which clauses delegate to the Respondent Union authority to settle controversies relating to seniority.

(2) Entering into or renewing any agreement with any labor organization which contains provisions delegating to such labor organization authority to determine the seniority of employees or to settle controversies relating to seniority, and enforcing such provisions.

(3) Encouraging membership in the Respondent Union, or in any other labor organization of its employees, by failing and refusing to assign work to its employees to which they would have been entitled and assigned had their seniority been determined as of the date of their employment by the Respondent Company rather than as of the date of acquisition of union membership, or by discriminating against them in any other manner in regard to their hire or tenure of employment or any term or condition of their employment, except to the extent permitted by Section 8 (a) (3) of the Act.

(4) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to an analysis of the amounts of back pay due in accordance with this Order.

(2) Post at its terminal in Kansas City, Missouri, copies of the notice attached as Appendix A.[30] Copies of the notice, to be furnished by the Regional Director for the Seventeenth Region as the agent of the Board, shall be posted by the Respondent Company immediately upon their receipt, after being duly signed by an official representative of the Company. When posted, they shall remain posted for sixty (60) consecu-

[30] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

tive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Company to insure that these notices are not altered, defaced, or covered by any other material.

(3) Notify the Regional Director for the Seventeenth Region, in writing, within ten (10) days from the date of this Order what steps it has taken to comply herewith.

2. The Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, its officers, representatives, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing or giving effect to the clauses in the contracts of November 12, 1949, and of January 31, 1952, known as the "Central States Area Over-the-Road Motor Freight Agreements" to which it is a party and which covers the employees at the Company's Kansas City, Missouri, terminal, which clauses delegate to it authority to settle controversies relating to seniority.

(2) Entering into or renewing any agreement with any employer which contains provisions delegating to it authority to determine the seniority of employees or to settle controversies relating to seniority, and enforcing such provisions.

(3) Causing or attempting to cause the Respondent Company, its officers, agents, successors, or assigns, to discriminate against employees in violation of Section 8 (a) (3) of the Act.

(4) In any other manner restraining or coercing employees of the Respondent Company in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Post at its business offices and meeting halls in Kansas City, Missouri, copies of the notice attached as Appendix B.[31] Copies of the notice, to be furnished by the Regional Director for the Seventeenth Region as the agent of the Board, shall be posted by the Respondent Union immediately upon their receipt, after being duly signed by an official representative of the Union. When posted, they shall be maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that these notices are not altered, defaced, or covered by any other material.

(2) Mail signed copies of the notice attached to this report as Appendix B to the Regional Director for the Seventeenth Region, for posting, the Respondent Company willing, at the

[31] See footnote 30, supra.

office and places of business of the Respondent Company, in the places where notices to employees are customarily posted. Copies of the notice to be furnished by the Regional Director for the Seventeenth Region as the agent of the Board, shall be returned forthwith to the Regional Director after they have been signed by an official representative of the Union, for such posting.

(3) Notify the Regional Director for the Seventeenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

3. The Respondents, Pacific Intermountain Express Company, its officers, agents, successors, and assigns, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, its officers, agents, successors, and assigns, shall jointly and severally, and in the manner set forth in the section of this Decision and Order entitled "The Remedy," make whole Carlos Beall, Paul Dunbar, Alvin Chatburn, J. M. Niehaus, and Willis Bradshaw for any loss of pay each may have suffered because of the discrimination against him.

IT IS FURTHER ORDERED that the complaint insofar as it alleges a violation of Section 8(a)(2) of the Act in the deduction by the Respondent Company from the wages of its employees of over-the-road assessments and insofar as it alleges a violation of Section 8 (a) (4) of the Act be, and it hereby is, dismissed.

Member Murdock took no part in the consideration of the above Decision and Order.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT perform or give effect to the clauses in the contracts of November 12, 1949, and January 31, 1952, known as the "Central States Area Over-The-Road Motor Freight Agreements" to which this company is a party and which cover the employees at this company's Kansas City, Missouri, terminal, which clauses delegate to International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-The-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, authority to settle controversies relating to seniority.

WE WILL NOT enter into or renew any agreement with any labor organization which contains provisions delegating to such labor organization authority to determine the seniority of employees or to settle controversies relating to seniority, and we shall not enforce such provisions.

WE WILL NOT encourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, or in any other labor organization of our employees, by failing and refusing to assign work to our employees to which they would have been entitled and assigned had their seniority been determined as of the date of their employment rather than as of the date of acquisition of union membership, or by discriminating against them in any other manner in regard to their hire or tenure of employment or any term or condition of their employment, except to the extent permitted by Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

WE WILL make Carlos Beal, Paul Dunbar, Alvin Chatburn, J. M. Niehaus, and Willis Bradshaw whole for any loss of pay they may have suffered by reason of the discrimination practiced against them.

All of our employees are free to become, remain, or to refrain from becoming or remaining members of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement authorized by Section 8 (a) (3) of the Act.

PACIFIC INTERMOUNTAIN EXPRESS COMPANY,
Employer.

Dated ..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date of posting, and must not be altered, defaced, or covered by any other material.

APPENDIX B

NOTICE

TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD and CITY TRANSFER DRIVERS, HELPERS, DOCKMEN & WAREHOUSEMEN, LOCAL NO. 41, AFL

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the

National Labor Relation Act, as amended, we hereby notify you that:

WE WILL NOT perform or give effect to the clauses in the contracts of November 12, 1949, and of January 31, 1952, known as the "Central States Area Over-The-Road Motor Freight Agreements" to which this union is a party and which cover the employees at the Kansas City, Missouri, terminal of Pacific Intermountain Express Company, which clauses delegate to this union authority to settle controversies relating to seniority.

WE WILL NOT enter into or renew any agreements with any employer which contain provisions delegating to this union authority to determine the seniority of employees or to settle controversies relating to seniority, and we will not enforce such provisions.

WE WILL NOT cause or attempt to cause Pacific Intermountain Express Company, its officers, agents, successors, or assigns, to discriminate against its employees within the meaning of Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees of the above company, its successors or assigns, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act, as amended.

WE WILL make whole Carlos Beall, Paul Dunbar, Alvin Chatburn, J. M. Niehaus, and Willis Bradshaw for any loss of pay suffered because of the discrimination practiced against them.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD and CITY TRANSFER DRIVERS, HELPERS, DOCKMEN & WAREHOUSEMEN, LOCAL NO. 41, AFL,

Labor Organization.

Dated ..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date of posting, and must not be altered, defaced, or covered by any other material.

Intermediate Report

STATEMENT OF THE CASE

Upon charges duly filed by Carlos Beall, Paul Dunbar, Alvin Chatburn, J. M. Niehaus, and Willis Bradshaw, individuals, against Pacific Intermountain Express Company, herein called the Respondent Company or the Company, and against International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, herein called the Respondent Union or the Union, the General Counsel of the National Labor Relations Board, respectively called herein the General Counsel and the Board, by the Regional Director for the Seventeenth Region, consolidated the cases and issued a complaint, dated November 24, 1952, alleging that the Respondent Company had engaged in unfair labor practices within the meaning of Section 8 (a) (1), (2), (3), and (4) of the National Labor Relations Act, as amended, herein called the Act, and that the Respondent Union had engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act, all affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The Company and the Union filed answers, in which they admitted jurisdictional and other allegations in the complaint but denied commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Kansas City, Missouri, starting on December 15, 1952, and ending on January 12, 1953, before the undersigned Trial Examiner. At the hearing, both the Union and the Company made motions to dismiss the complaint, as amended. Ruling on the motions was reserved. The motions to dismiss are disposed of as hereinafter indicated. After the hearing, all parties filed briefs with the Trial Examiner.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT COMPANY

The Company is a Nevada corporation which maintains its general offices in Oakland, California, and has terminals in California, Utah, Nevada, Idaho, Missouri, Colorado, and Illinois. Operating as a motor freight carrier in the above-named and other States under the authority granted by the regulatory commissions of the various States and by the Interstate Commerce Commission, the Respondent Company is engaged principally in the transportation of commodities in interstate and foreign commerce. It does an annual business in excess of $12,000,000. Its Kansas City, Missouri, terminal is the only one involved in the instant proceeding.

II. THE LABOR ORGANIZATION INVOLVED

The Central State Drivers Council, hereinafter called the Council, and the Respondent Union are labor organizations within the meaning of Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The first charges in this proceeding were filed by Carlos Beall on April 14, 1952. The charges alleged, in substance, that the Respondent Company had induced him and other employees to become and remain members of the Union by discriminating in regard to hire and tenure of employment through giving effect to seniority provision and union rules which denied employees their rights guaranteed in the Act; and that the Respondent Union had caused the Company to discriminate against him and other employees for reasons other than failure to tender dues or initiation fees uniformly required as a condition of employment as provided in the Act, and thereby had denied him the full 30 days provided for in the Act, during which employees are free to refrain from joining a labor organization. Similar charges were filed by Paul Dunbar on April 15, 1952; by Alvin Chatburn on April 16, 1952; by J. M. Niehaus on April 21, 1952; and by Willis Bradshaw on September 18, 1952.

The complaint alleges, in substance, that Respondent Union and the Council have been recognized jointly as the collective-bargaining representative of the Company's employees; that the Company and the Union entered into, and gave effect to, a collective-bargaining contract which was effective for the period from November 16, 1949, to January 31, 1952,

and which contained union-shop and seniority clauses;[1] that prior to the execution of said contract, no union-shop election had been held; that the Company and the Union on about January 31, 1952, entered into a contract, effective from February 1, 1952, to January 31, 1955;[2] that on or about November 21, 1951, the Union posted a seniority roster at the Company's terminal, and thereafter posted revisions thereof, pursuant to the provision of the said contracts; that the Union in preparing said seniority roster and revisions established the seniority of some employees as of the date they acquired membership in the Union, rather than as of the date of their employment by the Company; that the Union assigned each of the charging parties herein seniority dates on said roster which were later than the dates of their employment, and a lower rank on said roster than was assigned to other employees who were employeed subsequent to them; that pursuant to an agreement between the Company and the Union, after November 19, 1951, the Company assigned work to employees on its "extra board"[3] on the basis of their seniority, as determined by the Union, rather than on the basis of rotation or "first in, first out" on which the work previously had been assigned; that since on or about November 19, 1951, the Company awarded runs and assigned work in accordance with said seniority roster and revisions thereof; that the Company and the Union, since on or about April 15, 1952, have denied to the charging parties their seniority rights because they filed charges under the Act, and have given testimony to the Board; and that in January 1952, the Company at the Union's request deducted from the wages due each of its employees, without their written authorization, a "2 over-the-road assessment" levied by the Council.

The contracts referred to in the complaint are the "Central States Area Over-the-Road Motor Freight Agreements," governing trucking operations throughout a 12-State area. Negotiations leading to the execution of the contracts were conducted in Chicago by representatives of all the local unions affiliated with the International and of all the employers in the area. The negotiating committee representing the unions in said area, including the Respondent Union, is called the Central States Drivers Council. The employers, including the Respondent Company, were represented by various employer associations.

There are few, if any, material issues of fact in the case. In their answers, the Company and the Union admit that no union-shop election had been held in the bargaining unit in which the charging parties were included before the execution of the 1949 contract. The seniority clauses of both contracts contain the provision, "Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement."

The undisputed evidence shows that it was the practice for the Company to submit its seniority roster to the Union for the purposes of checking seniority dates. The Company's roster eliminated names of employees who had been terminated and added the names of new employees with the dates of their employment. The Union often made changes on the roster, assigning employees seniority dates different from those on the Company's roster. The roster, as revised by the Union, was posted at the terminal. A. D. Schaefer, the Company's director of employee relations, testified to the effect that all questions on seniority were determined by the Union, and that under the terms of the contract seniority was "a matter over which we had no control."

Before April 21, 1952, the Union fixed the seniority date of employees as of the date they effected their transfer of membership from another local or deposited their withdrawal cards[4] with the Union. After April 21, the Union changed its policy with respect to employees who transferred their membership. The seniority date for such employees was determined as of the date of employment by the Company, rather than the date when the transfer was effected.

Floyd R. Hayes, president of the Union, testified to the effect that employees who were not members of the Union when hired (not including members of other locals or those who had taken out withdrawal cards) were assigned seniority dates as of the date of their employment by the Company, rather than the date of their initiation into union membership.

[1] The contract provisions involved herein are set forth in Appendix A, attached hereto.

[2] The provisions of this contract, as alleged in the complaint, are set forth in Appendix B, attached hereto.

[3] Employees on the extra board were those who were not successful in bidding on regular established runs, or who did not choose to accept such runs.

[4] It appears that by taking out a withdrawal card a member of the Union became an inactive member When he deposited the withdrawal card with the Union, he again became an active member without paying the initiation fee.

His testimony in this connection shows otherwise. The Union's seniority roster, dated November 21, shows that employees Harold Davidson, Claude Williams, and Robert Kenshaw were assigned seniority dates as of the date of their union initiation, which dates were later than the dates of their employment by the Company

The Company maintains an "extra board" of drivers who are not assigned to the regularly scheduled runs. It was operated on a rotation basis for a number of years until November 1951, when it was changed to a seniority basis. In April or May 1952, it was changed back to a rotation basis. In July 1952, it again reverted to the seniority basis, on which it remained until the time of the hearing herein.

The undisputed evidence discloses that all of the charging parties herein were adversely affected in their hire and tenure of employment by the seniority practices followed by the Union and the Company. Chatburn was hired by the Company on June 14, 1950. His transfer to the Union was effected on June 21, 1950, and he was assigned seniority as of that date on the Union's seniority roster of November 1951. Three employees who were hired by the Company after Chatburn had higher positions on the roster. His working assignments were not adversely affected until the Union issued the seniority roster on about November 21, 1951, and the assignment of work by seniority was instituted on the extra board.

Beall was hired by the Company on September 26, 1951. His transfer to the Union was not effected until October 8, 1951, which date was assigned to him by the Union as his seniority date on its November roster. Seven employees who were hired after Beall had higher positions on said roster. Beall's employment was terminated on August 1, 1952, for the reason that he did not get enough work on the extra board, which in turn was due to his low position on the seniority roster.

Dunbar was hired on August 27, 1951, but was assigned a seniority date of September 10, 1951, on which date he was reinstated as a member of the Union. He ranked lower on the Union's November 1951 seniority roster than another employee who was hired on August 28, 1951.

Niehaus was employed by the Company on September 6, 1951, but was assigned a seniority date of September 25, 1951, at which time his transfer to the Union was effected. Nine other employees who were hired after him had higher positions on the November seniority roster.

Willis Bradshaw was employed by the Company on October 8, 1951. He deposited his withdrawal card with the Union on October 11, 1951. The Union assigned him a seniority date of October 11, 1951, on its November 1951 roster. He had a lower position on the roster than four employees who were hired after him. Due to the change from rotation to seniority as the basis for assignment of work on the extra board as related above, Bradshaw was included in a layoff of drivers which occurred on or about November 21, 1951. The four employees who were hired after Bradshaw were not affected by the layoff After his layoff, Bradshaw was recalled for a few days of work intermittently The Company's records show that he quit on August 21, 1952, because the "seniority extra board did not allow him to work "

The General Counsel contends that Beall and Bradshaw were constructively discharged on August 1 and August 21, 1952, respectively, and that such discharges were violations of the Act. The General Counsel does not contend that any of the employees were discriminated against in their working assignments before November 21, 1951 This date is within the 6-month period specified in Section 10 (b) of the Act, since the first charge in the proceeding was filed by Beall on April 14, 1952.

The General Counsel contends

> By the enforcement of the illegal union-security provision of the 1949 contract and by the discriminatory application of the seniority provision of the 1949 contract, both later, in point of time, than 6 months prior to the filing of the charges on April 14, 1952, and also by the discriminatory application of the seniority provisions of its 1952 contract, the Respondent Company has engaged in conduct violative of Section 8 (a) (1) (2) and (3) of the Act
>
> The Respondent Union is jointly responsible with Respondent Company for the enforcement of the illegal union security provisions and the discriminatory application of the seniority provisions of the 1949 and the 1952 contract within a period of 6 months prior to the filing of the charge on April 14, 1952, as well as thereafter, and thereby has engaged in unfair labor practices violative of Section 8 (b) (1) (A) and (2) of the Act. Where no lawful contractual obligation exists, neither the membership of Respondent Company's employees in Respondent Union, nor the Respondent Union's desire to enforce an alleged obligation of such membership removes the case from application

of the principle that an employer may not lend its assistance to a union in compelling adherence to the latter's rules and the Respondent Union violated Section 8 (b) (2) and 8 (b) (1) (A) by causing Respondent Company to discriminate against its employees.

It is undisputed that the union-security clause of the 1949 contract was illegal. However, it is my opinion, in agreement with the Company's contention, that the clause became lawful when the Act was amended on October 22, 1951. Therefore, since there is no contention that the employees involved herein were discriminated against in their working assignments before on or about November 21, 1951, the issue is whether or not the discriminations were protected by the provisos to Section 8 (a) (3) and Section 8 (b) (1) (A) and by Section 8 (b) (2) of the Act.

It is clear from Section 7 and Section 8 (a) (3) of the Act that an employee has a right to refrain from joining a labor organization for 30 days following the date of his employment when membership therein is required as a condition of employment. Nothing in Section 8 (b) (1) (A) or (2) detracts from that right. Section 8 (b) (2), in effect, sanctions a discrimination only when an employee fails "to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring and retaining membership." In the instant case, the Union caused the Company to discriminate against the employees named above on another ground, namely, their failure to acquire union membership at the time of their employment. It follows that, in order to protect their seniority rights, employees were encouraged to join the Union before they were required to do so.

In its brief, the Company cites the decision of the Board in Firestone Tire and Rubber Company, 93 NLRB 981. The Respondent Union herein also was a respondent in that case, and an almost identical seniority clause was involved. With respect to the seniority clause the Board held:

> The General Counsel has excepted to the Trial Examiner's failure to find that the seniority provision of the contract between the Employer and the Union in itself violated the Act. We find no merit in this exception. The seniority provision, although permitting the Union to control seniority to some extent, does not on its face provide that the Union should do so because of union affiliation.

In the instant case the General Counsel makes no claim that the seniority provision is per se violative of the Act. Further, in the above decision, the Board held, in effect, that the discrimination (reduction in seniority) was protected because the employee involved had failed to maintain his union membership in good standing. Clearly, the Firestone decision is not applicable to the instant case, since the discriminations herein were based on grounds other than failure to maintain membership in good standing.

The Respondents' contention with respect to the proviso to Section 8 (b) (1) (A) of the Act is rejected. This proviso does not enlarge the limits of protected discrimination afforded by Section 8 (a) (3) and 8 (b) (2). Further, the union-security clause in the 1949 contract did not become valid until on and after October 22, 1951; and the employees involved all were members in good standing of the Union before that date.

Accordingly, it is found that by reducing the seniority of the employees named above the Company violated Section 8 (a) (1) and (3) of the Act. It also is found that Beall and Bradshaw were discharged constructively on August 1 and August 21, 1952, respectively; and that such discharges were violative of the Act since they resulted from the Company's discriminatory reduction of seniority. It is found that the Union violated Section 8 (b) (1) (A) and 8 (b) (2) of the Act, in that it restrained and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act, and in that it caused the Company to discriminate against the employees in violation of Section 8 (a) (3) of the Act.

The complaint alleges that the Company violated Section 8 (a) (4) of the Act. In this connection, Chatburn testified without contradiction that he filed a grievance with the Union for the purpose of having his seniority date corrected; and that Cy Wilburn, the Union's steward, told him, in substance, that the Union could not consider his grievance since he had filed a charge with the Board. The evidence shows that on April 21, 1952, the Union's policy with reference to the establishment of seniority for employees who transferred their membership was changed so that the seniority date started from the date of employment; and that during November 1952, the Union corrected the seniority date of one employee so as to show his seniority date as February 10, 1946, rather than February 10, 1947. As of the date of the hearing herein, the seniority dates of the five employees in-

volved had not been corrected. The General Counsel contends that insofar as the seniority standings of the employees were concerned the Union was acting as the Company's agent.

The evidence shows that the Company conferred upon the Union complete authority to determine seniority standings of employees and to settle all controversies over such seniority. It is apparent that this policy was in accordance with the Company's interpretation of the seniority provisions of the contracts. However, these provisions were the result of collective bargaining between the Company and the Union, with the latter acting as the bargaining agent of the employees. Accordingly, the General Counsel's contention is rejected; and it is found that the Company did not violate Section 8 (a) (4) of the Act.

The complaint also alleges that the Respondent violated Section 8 (a) (2) of the Act. The 1952 contract provides for a checkoff of "dues, initiation fees and/or uniform assessments of the Local Union." During February 1952, the Company deducted $2 from the wages of those of its employees who had executed written authorizations for deduction of dues. This deduction was for yearly assessment or dues of the Central States Drivers Council. The license card or receipt issued by the Council to the employees identifies the deduction as an "over-the-road assessment." Schaefer, the Company's director of employee relations, testified without contradiction in this connection as follows:

> By previous arrangement with Local 41, dues are deducted on a quarterly, rather than on a monthly basis. Local 41 states our company at those periods, listing all of the employees subject to check-off, and agreement and indicate the amount that is due them. We then prepare the deduction from the next pay roll and make a remittance to the union.
>
> Each February for a good many years that I can recall, even before I had anything to do with it in this particular job, there has been a dues collection and it has been included on the statement of the collecting union for a road card in the Central States Drivers, the area contract set-up.
>
> I don't think it is an assessment. It isn't billed as an assessment. It is billed as dues for that particular purpose and it is our understanding that that comes once a year.

It is clear from Schaefer's testimony that the Respondent considered the deductions in question as uniform dues. I do not find that by making such deductions the Company rendered aid and support to the Union in violation of Section 8 (a) (2) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company and the Union, set forth in section III, above, which occurred in connection with the operations of the Company set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Since it has been found that the Company and the Union have engaged in unfair labor practices, it will be recommended that each of them cease and desist therefrom and take certain affirmative action, including the posting and distribution of appropriate notices, designed to effectuate the policies of the Act.

It has been found that the Company, when on about November 21, 1951, it accepted and put into effect the Union's determination of the seniority dates of the charging parties herein, interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by the Act, and discriminated in regard to their hire and tenure of employment and their terms or conditions of employment. It has been found that as a result of the discriminatory reduction in seniority, the Company constructively discharged Carlos Beall and Willis Bradshaw on August 1 and August 21, 1952, respectively. It also has been found that the Union caused the Company to discriminate against its employees in violation of Section (a) (3) of the Act.

It will be recommended that the Respondent Company offer Beall and Bradshaw immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights or privileges. It further will be recommended that the Respondent Company and the Respondent Union, jointly and severally, make whole Beall

and Bradshaw for any loss of pay they may have suffered by reason of discrimination by payment of a sum of money equal to that which they would have earned as wages from the dates of discharge to the date of an offer of reinstatement, less their net earnings during such period.

The pay lost by Beall and Bradshaw should be computed on a quarterly basis, in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289.

Other than the above, it will not be recommended that the five charging parties be made whole. The record conclusively discloses that the discriminatory reduction of their seniority adversely affected their assignment of bid runs and of work on the extra board. However, the evidence in this connection is speculative, and is not sufficiently definite so that any such recommendation can be based thereon.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The unfair labor practices found herein are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.
2. The Respondent Union and the Council are labor organizations within the meaning of Section 2 (5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent Company has engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.
4. By discriminating in regard to the hire and tenure of employment and other terms and conditions of employment of the charging parties herein, the Respondent Company has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.
5. The Respondent Company has not engaged in unfair labor practices within the meaning of Section 8 (a) (2) and (4) of the Act.
6. By attempting to cause and causing the Respondent Company to discriminate against its employees, and thus to commit an unfair labor practice within the meaning of Section 8 (a) (3) of the Act, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.
7. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

[Recommendations omitted from publication.]

APPENDIX A

ARTICLE II

Union Shop and Dues

(a) The Union shall be the sole representative of those classifications of employees covered by this Agreement in collective bargaining with the Employer.

Section 1

The Employer agrees that any and all employees within the classification of work as herein provided shall be members of the Union in good standing as a condition of continued employment. When the Employer needs additional men, he shall give the Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Union. If a non-member is hired, he shall work under the provisions of this Agreement, shall make application for membership in the Union, and become a member no later than the thirty-first (31st) day of his employment, and shall thereafter maintain membership in good standing in the Union as a condition of continued employment.

The above paragraph shall not apply to any Union, party to this Agreement, until such time as it is properly certified by the National Labor Relations Board as being authorized to enter into such Agreement nor shall it apply in any state where prohibited by state law.

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If the first paragraph hereof is invalid under the law of any state wherein this contract is executed, it shall be modified to comply with the requirements of state law or shall be renegotiated for the purposes of adequate replacement.

* * * * * * *

(b) A new employee shall be employed only on a thirty-day trial basis, during which period he may be discharged without further recourse, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty days the employer shall be placed on the regular seniority list.

Section 2 The Employer agrees to deduct from the pay of all employees covered by this Agreement dues, initiation fees and/or assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions. Where laws require written authorization by the employee, the same is to be furnished in the form required.

ARTICLE V.

Seniority. Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary quit, or more than a two-year lay-off. In
Section 1 the event of a lay-off, an employee so laid off shall be given two weeks' notice of recall mailed to his last known address. In the event the employee fails to make himself available for work at the end of said two weeks, he shall lose all seniority rights under this Agreement. A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement.

Section 3 (a) All runs and new positions are subject to seniority and shall be posted for bids. Posting shall be at a conspicuous place so that all eligible employees shall receive notice of the vacancy, run or position open for bid, and such posting of bids shall be made out more than once each calendar year, unless mutually agreed upon. Peddle runs shall not be subject to bidding. Past practices shall prevail in bidding on peddle runs.

(b) When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in the reverse order in which they are laid off.

APPENDIX B

ARTICLE II

Union Shop (a) The Employer recognizes and acknowledges that the Central States Drivers
and Dues Council and the Local Union are the exclusive representative of all employees in the classifications of work covered by this Agreement for the purposes of
Section 1 collective bargaining as provided by the National Labor Relations Act.

(b) All present employees who are members of the Local Union on the effective date of this subsection shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain members in good standing of the Local

Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this subsection, whichever is the later. This provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act, but not retroactively

(c) When the Employer needs additional men he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union

(d) No provision of this Article shall apply in any state to the extent that it may be prohibited by state law If under applicable state law additional requirements must be met before any such provision may become effective, such additional requirements shall first be met.

(e) If any provision of this Article is invalid under the law of any state wherein this contract is executed, such provision shall be modified to comply with the requirements of State Law or shall be re-negotiated for the purpose of adequate replacement If such negotiations shall not result in mutually satisfactory agreement, either party shall be permitted all legal or economic recourse.

(f) In those instances where subsection (b) hereof may not be validly applied, the Employer agrees to recommend to all employees that they become members of the Local Union and maintain such membership during the life of this Agreement, to refer new employees to the Local Union representative, and to recommend to delinquent members that they pay their dues since they are receiving the benefits of this contract

(g) To the extent such amendments may become permissible under applicable Federal and State Law during the life of this Agreement as a result of legislative, administrative or judicial determination, all of the provisions of this Article shall be automatically amended to embody the greater Union security provisions contained in the 1947-1949 Central States Area Over-the-Road Freight Agreement, or to apply or become effective in situations not now permitted by law

(h) Nothing contained in this section shall be construed so as to require the Employer to violate any applicable law.

Section 2 A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty-day trial basis, during which period he may be discharged without further recourse provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty days the employee shall be placed on the regular seniority list

In case of discipline within the thirty-day period, the Employer shall notify the Local Union in writing.

Section 3 The Employer agrees to deduct from the pay of all employees covered by this Agreement dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions Where laws require written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by applicable law

ARTICLE V

Seniority

Section 1 Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary quit, or more than a two-year lay-off. In the event of a lay-off, an employee so laid off shall be given two-weeks' notice of recall mailed to his last known address. In the event the employee fails to make himself available for work at the end of said two weeks, he shall lose all seniority rights under this Agreement. A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Stewards shall be granted super-seniority for purposes of lay-off and rehire only, if requested by the Local Union within thirty (30) days after the effective date of this agreement; but only one steward shall have super-seniority for purposes of lay-off. Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement. Such determination shall be made without regard to whether the employees involved are members or not members of a Union.

Section 2 The Employer shall not require, as a condition of continued employment, that an employee purchase truck, tractor and/or tractor and trailer or other vehicular equipment.

Section 3 (a) All runs and new positions are subject to seniority and shall be posted for bids. Posting shall be at a conspicuous place so that all eligible employees will receive notice of the vacancy, run or position open for bid, and such posting of bids shall be made not more than once each calendar year, unless mutually agreed upon. Peddle runs shall not be subject to bidding. Past practice shall prevail in bidding on peddle runs.

(b) When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in the reverse order in which they are laid off.

Section 4 (a) In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by the Union or Unions having jurisdiction over said employees. Such determination shall be made without regard to whether the employees involved are members or not members of a Union.

(b) If the minimum wage, hour and working conditions in the company absorbed differ from those minimums set forth in this Agreement, the higher of the two shall remain in effect for the men so absorbed.

Section 5 The Union reserves the right to cut the seniority board when the average weekly earnings fall to $75 or less. This is not to be construed as imposing a limitation on earnings.

GEORGE BIANCHI AND LOUIS BIANCHI, d/b/a L. BIANCHI & SON *and* UNITED FRESH FRUIT & VEGETABLE WORKERS LOCAL INDUSTRIAL UNION NO. 78, CIO, Petitioner. Case No. 20-RC- 2340. January 14, 1954

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before David E.